No. 15818

United States Court of Appeals

For the Ninth Circuit

PACIFIC GAMBLE ROBINSON CO., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN
United States District Judge

APPELLANT'S BRIEF

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APPELLANT'S BRIEF

STATEMENT OF JURISDICTION

In this civil action, appellant, Pacific Gamble Robinson Co., a corporation (which will be referred to hereinafter as "Pacific"), sought to recover transportation taxes which it contends were illegally and erroneously collected from Pacific under Section 3475 of the Internal Revenue Code of 1939, as amended (Section 620(a) of the Revenue Act of 1942) (R. 4). The cause was tried in the District Court for the Western District of Washington, Northern Division, before the Honorable John C. Bowen, sitting without a jury (R. 50). The said District Court had jurisdiction of the cause under Title 28, U.S.C., Section 1346(a)(1) (R. 51). After trial, a judgment was entered in favor of the defend-

ant September 16, 1957 (R. 63). Appeal was taken on November 8, 1957 (R. 64) and filed in this court on December 11, 1957 (R. 71). This court has jurisdiction of the appeal under Title 28 U.S.C., Sections 1291 and 1294 (1).

STATEMENT OF THE CASE

Payment of Freight Bills Covering Transportation of Property Originating Between June 30, 1950, and October 31, 1950

Pacific was in 1950 and it now is a Delaware corporation engaged in the wholesaling of fresh fruits and vegetables and processed food stuffs in various states of the United States, as well as, through subsidiaries, in Canada. Its principal place of business was and is in Seattle, Washington (R. 51).

It maintained branches in various cities in Colorado, Idaho, Montana, Nebraska, Oregon, South Dakota, Utah, Washington and Wyoming (see first column of Exhibit A to the Complaint of plaintiff (R. 21-24; Exhibit 1), in which it did business under the name of "Pacific Fruit and Produce Company," with its main office for these operations in Seattle (R. 51). It had other branches in various cities in which it did business under the name of "Gamble-Robinson Company," with its main office for these operations in Minneapolis, Minnesota (R. 51-2). Pacific had a subsidiary corporation known as Slade & Stewart, Ltd., in Vancouver, B. C. (R. 55), and a subsidiary corporation known as Gamble-Robinson, Ltd., in Toronto (R. 58).

During the period of July through November of 1950,

Pacific received freight bills from various railroad companies with which it dealt (R. 52, and see Exhibit A to Complaint, R. 21-4, and Exhibit 1), for the rail transportation of food stuffs to and between its offices and branches within the United States. This transportation originated prior to November 1, 1950 (R. 52). Each of the railroad companies from which these bills were received maintained an office in Canada (R. 53) at which its agent was authorized to receive payment of the bills (R. 55, 57, 58). Some of these offices were in Vancouver, B. C. (R. 55), some in Winnipeg, Manitoba (R. 56), and some in Toronto, Ontario (R. 57). Pacific paid the above-mentioned freight bills at the Canadian offices of the railroad companies, in the manner described below, and was required to pay a tax thereon in the amount of 3%. This tax was collected by the railroad companies acting under the direction of the Commissioner of Internal Revenue (Ex. A-5) and under the authority of Section 3475 of the Internal Revenue Code of 1939 as amended (Section 620 (a) of the Revenue Act of 1942). The action was brought for the recovery of the tax so collected.

Payment of such freight bills incurred by Pacific, doing business as Pacific Fruit & Produce Company, was made in the following manner:

Upon receipt of freight bills from time to time from branches of Pacific Fruit & Produce Company, Pacific's Seattle office issued checks in payment of the charges and the 3% transportation tax thereon, drawn upon Pacific's accounts in one of two Seattle banks (Exhibits 2 through 11 are examples) and mailed these

checks, together with the freight bills which they paid to representatives in Vancouver, B. C., who were employed and paid jointly by Pacific and Slade & Stewart, Ltd. (R. 54-56). These representatives delivered the checks and freight bills, during regular office hours, to the duly authorized agents of the railroad companies concerned in Vancouver, B. C., who received the checks in payment of the freight bills, stamped the bills "paid" and returned the receipted bills to the representatives of Pacific (R. 55).

Payment of such freight bills incurred by Pacific, doing business as Gamble-Robinson Company, was made in the following manner:

The Minneapolis office of Pacific received freight bills from branches of Gamble-Robinson Company, and mailed them, together with checks covering the transportation charges and the 3% transportation tax thereon, drawn upon Pacific's account in a Minneapolis bank, either to A. A. McGibbon, Pacific's representative in Winnipeg (R. 56) or to Peter McKercher, an employee of Gamble-Robinson, Ltd., in Toronto (R. 58), depending upon whether the railroad companies concerned had offices in Winnipeg or Toronto. In each instance, the checks, together with the freight bills which they paid (Exhibits 12 through 16 are examples), were delivered by the said A. A. McGibbon or Peter McKercher to the duly-authorized agents of the railroad companies concerned during regular business hours, and were by these agents received in payment. The agents marked the bills "paid" and returned them

to the said A. A. McGibbon or Peter McKercher (R. 57-58).

The amounts thus paid by Pacific in all three Canadian cities for the transportation of property arising prior to November 1, 1950, were in the aggregate sum of $2,605,012.47, and the tax collected thereon totalled $78,937.17 (R. 53).

In each instance, the checks were in due course honored by the banks on which they were drawn, and the tax so collected from Pacific was paid by the railroad companies to the Collector of Internal Revenue in the district in which they had their principal places of business (R. 55, 57, 59; and see recapitulation of amounts paid to each railroad company in Exhibit A to Complaint (R. 21-4 and Exhibit 1)).

Transportation Tax Statute (IRC 3475)

By Section 3475 of the Internal Revenue Code of 1939 as amended,[1] Congress imposed a 3% excise tax effective December 1, 1942, *upon amounts paid within the United States* for transportation of property from one point in the United States to another, in the following language:

> "(a) Tax — There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, * * *."

[1] Added by Act of October 21, 1942, C. 619, Title VI, Section 620(a), 56 Stat. 979; 26 USCA 3475; Appendix A.

On December 7, 1942, the Treasury Department issued a Mimeograph Letter (Exhibit A-1, R. 60)[2] explaining section 3475, which stated, among other things:

> "6. The tax does not apply to the amount paid for the transportation of property:
>
> " * * *
>
> "(c) When paid outside the United States, regardless of where the transportation occurs; * * *."

This construction was adhered to in letter ruling of the Treasury Department dated April 11, 1950 (Ex. A-3, R. 60) and Treasury Department letter dated June 28, 1950 (Ex. A-4, R. 60). And in a series of mimeographed rulings, the Commissioner of Internal Revenue, in defining the scope of Section 3475, referred uniformly and repeatedly to the tax as one imposed "upon amounts paid within the United States" (Ex. 17 through 19).[3]

On July 7, 1950, however, the Treasury Department Information Service issued Press Release S-2389 (Ex. A-5, R. 61) according to which the tax imposed by Section 3475 was purportedly extended by the Commissioner of Internal Revenue:

> " * * * to all shipments of property between two points in the United States * * * "

regardless of the place of payment, because:

> " * * * the law does not excuse anyone from this tax if he pays his domestic freight bills outside the United States."

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[2] Mim. 5447, 1942-2, Cum. Bull., p. 280.

[3] M.T. 15, 1943 Cum. Bull., p. 1158-9; M.T. 9, 1943 Cum. Bull., p. 1159-60; M.T. 13, 1943 Cum. Bull., p. 1161; M.T. 18, 1943 Cum. Bull., p. 1162; M.T. 26, 1948-1 Cum. Bull., p. 141; M.T. 35, 1949-1 Cum. Bull., p. 250.

On September 23, 1950, Congress enacted the Revenue Act of 1950, amending Section 3475(a) of the Internal Revenue Code of 1939 and, by this amendment, effective as to transportation originating on or after November 1, 1950, extended the tax imposed to amounts paid *without* the United States.[4]

On January 18, 1951, Part 143 of Regulations 113 was amended to reflect the extended scope of the newly-amended Section 3475(a):[5]

> "Section 143.11. *Scope of tax.*
>
> "Section 3475(a) imposes a tax upon (a) amounts paid within the United States after December 1, 1942, for transportation on or after such date, of property by rail, motor vehicle, water, or air from one point in the United States to another, and (b) *amounts paid without the United States, on or after November 1, 1950, for transportation originating on or after such date,* of property by rail, motor vehicle, water, or air from one point in the United States to another. The tax applies only to amounts paid to a person engaged in the business

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[4] Act of September 23, 1950, C. 994, Title IV, Sec. 607(b), 64 Stat. 966:

"Sec. 607, TRANSPORTATION WHICH BEGINS AND ENDS WITHIN THE UNITED STATES.

" * * *

"(b) Transportation of property — The first sentence of Section 3475(a) (relating to tax on transportation of property) is hereby amended to read as follows:

" 'There shall be imposed upon the amount paid *within or without* the United States for the transportation of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton.' " (Emphasis supplied)

[5] T.D. 5826, January 18, 1951, 16 F.R. 456, 1951-1 Cum. Bull., p. 148, 149.

of transporting property for hire." (Emphasis supplied)

Contrasting the application of the tax before and after the amendment, the Regulations continued:

"Section 143.13. *Application of tax.*

" * * *

"(4) With respect to *amounts paid within the United States,* the tax applies only to amounts paid after December 1, 1942, for transportation which originated on or after that date. No tax attaches to payments for transportation originating prior to the first moment of December 1, 1942. Payments made prior to December 2, 1942, are not taxable regardless of when the transportation occurs.

"With respect to amounts paid without the United States, the tax applies to amounts paid on or after November 1, 1950, for transportation originating on or after that date." (Emphasis supplied)

Claims for Refund, Pleadings and Trial

On June 28, 1954, Pacific filed claims for refund of the transportation tax in the aggregate sum of $78,937.17, together with interest, imposed on it under the authority of IRC Sec. 3475 on amounts paid in Canada for transportation originating prior to November 1, 1950. These claims were filed with each District Director of Internal Revenue for the Collection District in which any of the railroad companies concerned had its principal place of business. In each of these claims, Pacific asserted that the tax was illegally collected, since the amounts paid by Pacific for transportation as aforesaid were not paid within the United States and were

not taxable under IRC Section 3475. The claims were denied by the Commissioner of Internal Revenue by registered mail between December 23, 1954, and October 6, 1955 (R. 59-60).

Thereafter, on December 17, 1956, Pacific commenced this action by filing its complaint herein (R. 3-24), in which it alleged that the aforesaid taxes were erroneously and illegally collected from it, since the amounts upon which the tax was imposed were paid in Canada, outside the purview of IRC Section 3475, and prayed for judgment in the total sum of $78,937.17, with interest.

The material allegations of Pacific's complaint were denied by appellee in its answer, mainly on information and belief (R. 25-31).

All the facts material to the trial of the case were undisputed. They were set out in a Stipulation of Facts executed by Pacific and appellee, which was dated September 3, 1957, and duly filed (R. 31-43). The case went to trial on September 6, 1957 (R. 50), and was heard by the court on the Stipulation of Facts and Exhibits 1 to 16 and A-1 to A-5, inclusive, offered and admitted in evidence in accordance with the terms of the stipulation (R. 31), and exhibits 17 to 19, inclusive, which were also offered by appellant and admitted in evidence without objection (R. 70). No additional evidence was offered at the trial. At the conclusion of the trial, and after hearing the argument of counsel, the district court rendered an oral opinion in favor of the appellee (R. 48). In this opinion, the court ruled that even though the transportation charges were paid in Canada, the tax

was payable and properly collected under Sec. 3475(a) prior to its amendment in 1950 (R. 49). Thereafter, on September 16, 1957, Findings of Fact (R. 50), which incorporated largely the stipulated facts, Conclusions of Law (R. 61) and Judgment (R. 63) were entered, dismissing Pacific's complaint with prejudice.

Question Presented

The question before the court is this: May Section 3475(a) of the Internal Revenue Code of 1939, which prior to its amendment imposed a tax only upon amounts paid within the United States for transportation of property be extended by construction to impose the tax on amounts paid in Canada as well?

SPECIFICATION OF ERRORS

1. The court erred in its Conclusion of Law No. II (R. 61-2) that the plaintiff was required "to pay transportation taxes on shipments of property which were made entirely within the United States" without regard to the place where the payment for such transportation was made and in failing to conclude that said tax did not apply to payments made outside the United States.

2. The court erred in concluding as a matter of law that the transportation tax was payable even if the transportation charges upon which it was levied were in fact paid in Canada (R. 49).

3. The court erred in concluding as a matter of law that payment of freight charges in a "non-tax place" (R. 49-50) did not prevent the tax from attaching.

4. The court erred in concluding that the transportation taxes upon amounts paid in Canada were legally imposed and collected from appellant.

5. The court erred in refusing to grant judgment in the sum of $78,937.17 together with interest thereon and costs to the plaintiff and in entering judgment for the defendant.

ARGUMENT OF THE CASE

Summary of Argument

The argument of appellant falls under two main headings.

Under Point I we contend that the district court should have given effect to the plain meaning of Sec. 3475 instead of enlarging it by construction to tax amounts paid without the United States. First we set forth a resume of the history of this section and its interpretation. Then we discuss the application of the rule that there is no room for construction of a statute when there is no ambiguity. This is followed by a discussion of the rule that taxing statutes are not to be extended by implication and a demonstration of the wisdom of that rule as applied to the facts of this case. We next illustrate that the judgment of the district court supplies an omission from the statute and that by doing so the court transcended the judicial function. We demonstrate, further, that the construction of the court rendered a portion of the statute, the words "within the United States," meaningless. Finally, we contend that not only was reference to the legislative history of a later amendment upon which the court based its deci-

sion inappropriate, but that the contemporary committee reports do not support the construction of the court and impliedly militate against it.

Under Point II we demonstrate that the payment by check in Canada could not have been, under the applicable rules of law, payment within the United States.

ARGUMENT

I.

The Lower Court Should Have Given Effect to the Plain and Unambiguous Meaning of "Paid Within the United States" Instead of Enlarging Its Meaning by Construction to Include Amounts Paid Without the United States

It has been pointed out above that Section 3475 of the Internal Revenue Code of 1939[6] prescribed a 3% tax only upon the "amount paid within the United States" for transportation from one point in the United States to another.

For a period of approximately 7½ years after the effective date of this section (December 1, 1942), the Commissioner of Internal Revenue and his authorized representatives, in the official publications referred to above[7] stated and reiterated, expressly or tacitly, that the tax did not apply to amounts paid outside the United States regardless of where the transportation occurred.

On July 7, 1950, however, prior to the amendment of IRC Sec. 3475, the Commissioner of Internal Revenue,

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[6] Footnote (1), above.

[7] Mim. 5447, Par. 6(c), 1942-2 Cum. Bull. p. 280 at p. 281, Ex. A-1, Letter ruling dated April 11, 1950, Ex. A-3; Letter ruling dated June 28, 1950, Ex. A-4, and see footnote (3), above.

by press release purported to extend the original Section 3475 to apply to all transportation of property between two points in the United States, regardless of the place of payment of the charges.[8]

Not until the Revenue Act of 1950 was enacted was the tax imposed by Section 3475 actually extended by Congress so that it applied to amounts "paid within or without the United States"[9] for transportation of property from one point in the United States to another.

In his Regulations promulgated after enactment of the Amendment, the Commissioner again acknowledged the obvious difference in scope between the original and the amended statute by pointing out that the original Sec. 3475 imposed a tax on amounts paid *within the United States* after December 1, 1942, but that:

> "With respect to amounts paid without the United States, the tax applies to amounts paid on or after November 1, 1950, for transportation originating on or after that date."[10]

The payments involved in this case are those made by Pacific in Canada roughly from July through November, 1950, on transportation originating prior to November 1, 1950, the effective date of the amended statute (R. 53).

The meaning of the amended statute which extends the tax to payments without the United States is per-

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[8] Treasury Dept. Press Release S-2389, Ex. A-5.

[9] Act of September 23, 1950, C. 994, Title IV, Sec. 607(b), 64 Stat. 966; set forth in its relevant part in footnote (4), above.

[10] T.D. 5826, January 18, 1951, 16 F.R. 456, 1951-1 Cum. Bull. p. 148, 149.

fectly transparent, and is not questioned by Pacific. What Pacific complains of is the arbitrary change by the Commissioner, sanctioned by the lower court, in the equally lucid meaning of the earlier section. As clearly as the amendment added payments without the United States, the original statute failed to include them.

Appellant feels that, in the interests of adding a minimal amount of revenue to the Treasury,[11] the Commissioner of Internal Revenue has been allowed to usurp the functions of Congress and change the plain meaning of a statute, and that, in sanctioning this change, the district court disregarded the most basic rules of statutory construction. It feels, further, that while the fiscal significance of the case is small, the principle that the plain language of a revenue statute may be ignored or changed arbitrarily, no matter how lofty the motives involved, threatens the life of the doctrine of equal justice under a uniform rule of law which is one of the great and unique strengths of our juridicial system. The attrition of this doctrine in the instant case may appear to serve the government; in the next it may operate against it. In the long run, it is inimical both to the government and the individual.

That IRC Sec. 3475 did not expressly impose the tax

[11] Only a period of approximately four months in 1950 was involved. We know of only two other suits filed in U. S. district courts for refund of this tax, of which both were filed and tried in the Ninth Circuit and are pending on appeal before this court. Only two cases have been filed in the Court of Claims to our knowledge, of which only one, *Kellogg Company v. U. S.*, 132 Ct. of Claims 507, 133 F.Supp. 387 (1955), has been tried. The applicable statute of limitation of four years on filing of claims for refund (Sec. 3313, IRC of 1939) and of two years on commencement of actions after rejection of claims for refund (Sec. 3772(a)(1), IRC of 1939) would apparently have barred practically all other possible claims.

with which it deals upon the payments made by Pacific in Canada during the four-month period in question is patent.

As we understand the position of the government below, and the decision of the district court, no contention is made that the language of the statute is ambiguous or uncertain. . . . .

The district court, in its oral opinion, tacitly recognized that the statute did not in terms impose the tax on payments in Canada when it found that Pacific, in what the court called a "deviation," paid its transportation charges in a "non-tax place" (R. 50), to-wit, Canada.

Rather, the court accepted the contention of the government that the case of *Kellogg Company v. United States,* 132 Ct. Cl. 507, 133 F.Supp. 387 (1955), in which the Court of Claims had decided a somewhat similar case adversely to the taxpayer, should be followed. The court said:

> "It is a very risky matter at best for this court in the absence of other controlling authority, to knowingly decline to follow the pertinent rulings of the Court of Claims in a case involving a tax refund claim against the United States . . . " (R. 48)

And, following the lead of the *Kellogg* case, the district court held that the "construction" of IRC Sec. 3475 made by the Commissioner of Internal Revenue and approved by a Senate committee reporting upon the later Revenue Act of 1950, " . . . in effect, that the tax was payable even if the transportation charges were in fact paid in Canada" was a correct one (R. 49).

We will discuss the reasoning in the *Kellogg* case, the validity of the "construction" by the Commissioner of Internal Revenue, and the nature of the legislative history upon which reliance is placed in some detail below. But we should like first to point out why, in our opinion, the district court should have declined to consider these proferred aids to "construction."

There Is No Room for Construction of a Statute When There Is No Ambiguity

The cardinal prerequisite of statutory construction is that there be some ambiguity or uncertainly in a statute which requires interpretation. As the Supreme Court said in *Hamilton v. Rathbone,* 175 U.S. 414, 421, 44 L.ed. 219, 20 S.Ct. 155 (1899):

> "Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly in the domain of ambiguity, that an extended review of them is quite unnecessary."

When the language is plain and admits of only one meaning, the task of interpretation does not arise. In the words of the court in *Van Camp & Sons Co. v. American Can Co.,* 278 U.S. 245, 253, 73 L.ed. 311, 49 S.Ct. 112 (1929):

> "The words being clear, they are decisive. There is nothing to construe."

And see *Henderson v. Rogan* (9 Cir.) 159 F.(2d) 855, 859 (1947). The primary source of the intention of congress is the language of the statute, and " . . . where this expresses an intention reasonably intelligible and plain it must be accepted without modification by resort to construction or conjecture."

Thompson v. U. S., 246 U.S. 547, 551, 62 L.ed. 876, 38 S.Ct. 347 (1918).

For, as Mr. Justice Frankfurter wrote:

"... the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense."

Addison v. Holly Hill Fruit Products, Inc., 322 U.S. 607, 617, 88 L.ed. 1488, 64 S.Ct. 1215 (1944).

We submit that there is nothing ambiguous or uncertain in the language "paid within the United States," as used in IRC Sec. 3475. Its meaning is obvious. There is nothing in the statute to indicate that Congress intended that this plain, uncomplicated language be interpreted in any unusual manner. The court had nothing to construe under the cases cited above, and should have given to the statute its plain and natural meaning.

Taxing Statutes May Not Be Extended by Implication

Obvious though it may be that there is no evidence of the express intent of Congress that the tax apply to payments without the United States as well as within, could a court properly search for or postulate an *implied* intent of Congress? The Court of Claims thought so in the *Kellogg* case, and implied an intent that the tax not be avoided by the payment of charges across the border in Canada, when payment of the same charges on this side of the border would have resulted in taxation.

The search for an implied intent in the absence of

any ambiguity or uncertainty in the meaning of the words employed by Congress contravenes an established rule of statutory construction: that taxing statutes cannot be extended by mere implication. The rule was thus stated in *Gould v. Gould,* 245 U. S. 151, 153, 62 L.ed. 211, 38 S.Ct. 53 (1915):

> "In the interpretation of statutes levying taxes, it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

In *Smietanka v. First Trust & Savings Bank,* 257 U.S. 602, 605-6, 66 L.ed. 391, 42 S.Ct. 223 (1922), it was argued by the Government that a surtax upon net incomes of all individuals should be applied to the income of a trust accumulated for unborn beneficiaries because a general intention of Congress to tax all incomes should be implied. The court held unanimously against the Government. Speaking through Mr. Chief Justice Taft, it said:

> "It may be that Congress had a general intention to tax all incomes whether for the benefit of persons living or unborn, but a general intention of this kind must be carried into language which can be reasonably construed to effect it. Otherwise, the intention cannot be enforced by the courts. The provisions of such acts are not to be extended by implication."

Courts generally have wisely declined to be drawn into the treacherous quagmire of the search for legisla-

tive intent contrary to the plain language of a statute. The enactment of laws lies in the domain of politics. Their enactment is influenced by the fundamental political and economic attitudes and prejudices of the legislators and their constituents. The proper scope of a tax law, the proper subjects of taxation, equality and inequality in taxation, are sharply-debated questions to which the logic of the law alone usually can produce no answers.

Barring constitutional considerations, what Congress should or should not do or have done is a political or legislative question, and the proper responses thereto are legislative. Thus, if, as the Government contends, payments outside the United States should not have been excluded from IRC Sec. 3475, the appropriate response to the exclusion was the enactment of Section 607(b), of the Revenue Act of 1950. This was a matter for Congress itself. The proper inquiry of the court is limited to what Congress actually *meant* or *did* by a statute. And that is to be gathered from the statute, when it is unambiguous.

Excise taxation is historically and traditionally selective. Some commodities and transactions are taxed and others are not. Practically any excise tax statute presents serious problems in terms of pure logic. Many people may be unable to see any reason why Congress should have taxed one commodity or activity and have failed to tax another. Yet, arbitrary inclusions and exclusions based upon a variety of political and economic considerations have always existed and exist today. Conditioned by the prejudice of a particular economic,

political or social viewpoint, an individual may be utterly incapable of agreeing with the distinctions of such a law. But the argument that no one could believe that Congress intended what to the individual concerned is an inequity or even an absurdity is of no avail against the plain letter of the law.

IRC Sec. 3475 is illustrative of the customary selectivity of excise taxation. This excise tax statute does not purport to be exhaustive of all the subjects of possible taxation of property transportation within the U. S. In addition to the limitation of the tax on transportation within the United States to amounts paid within the United States, IRC Sec. 3475 makes other selections and limitations: For, example, when transportation takes place from a point outside the United States to a point within the United States, the part of such transportation which takes place within the U. S. is taxed *only when it is paid for within the United States.*

Pursuing the implied intent of Congress the Court of Claims in the *Kellogg* case,[12] with reference to payment in Canada of domestic transportation charges, said that Congress could not have intended to permit the "absurd result of inviting the escape from all such taxes by the simple device of carrying a check across the border and delivering it to an agent of the transportation company."

It can be argued with equal justification that Congress could not have intended to permit the escape from

[12] *Kellogg Company v. United States*, 132 Ct. Cl. 507, 132 F.Supp. 387 (1955).

all taxes on the domestic portion of transportation originating in Canada by the simple expedient of payment outside the United States. Yet Congress did not subject such payments to the tax.

Can there be any doubt that the language of Congress as well as its selected subjects of taxation, was carefully and deliberately chosen? To hold otherwise is to overlook the characteristics of modern revenue laws and their enactment. Tax statutes are written with consummate care. The authors of these statutes strain to make their language exact and precise and state the scope of the operative clauses completely and exhaustively. Months of study, discussion and debate are devoted to them.

If the Congress had intended to apply the tax to all domestic property transportation, regardless of where payment was made, it would have been as simple a matter to add the phrase "or without" in 1942 as it was in 1950, when the amendment supplied these words. It would have been equally simple to omit the qualification "within the United States," altogether as did the World War I prototype for Section 3475, Section 500 of the Revenue Act of 1917.[13] But Congress used neither of these obvious indications of intention and gave no sign whatever that it intended the tax to apply except to "amounts paid within the United States." We be-

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[13] Act of October 3, 1917, C. 63, Title V, Sec. 500, 40 Stat. 314 provided: "That from and after the first day of November nineteen hundred and seventeen, there shall be levied, assessed, collected and paid (a) a tax equivalent to three per centum *of the amount paid* for the transportation by rail or water or by any form of mechanical motor power when in competition with carriers by rail or water of freight consigned from one point in the United States to another * * * " (Emphasis added).

lieve that the words of the Supreme Court in *Addison v. Holly Hill Fruit Products, Inc.,* 322 U.S. 607, 618, 88 L.ed. 1488, 64 S.Ct. 1215 (1944), are particularly appropriate here:

> "The idea which is now sought to be read into the grant by Congress . . . is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least suggest it . . . "

It is reasonable to conclude that if Congress had intended the result sought by appellee it would have said so.

Once the view is taken that the manifest intent of Congress as evidenced by the statutes which it writes may be ignored in the pursuit of an assumed intent of the Congress, the opportunities for error and confusion are almost unlimited. Thus, the Court of Claims, searching for reasons in support of an apparent conviction that Congress could not have intended to exempt the shipper who paid for transportation across the border, declared that when IRC Sec. 3475 was enacted, "Canada had a law which taxed transportation in that country, similarly"[14] and that Congress wanted to place a corresponding tax on similar transportation in this country. "Congress, manifestly, instead of granting any exemption intended to close the gap and tax all transportation between points wholly within the United States. Evidently no thought was given to the possibility of a repeal of the Canadian tax and consequently no thought was given to the single phrase which plain-

[14] 132 Ct. Cl. 507, 512-3, 133 F.Supp. 387, 390 (1955).

tiff has undertaken to lift out of its context and construe as if it were the whole law."

On close analysis, this argument becomes logically self-defeating. For it assumes the point which it attempts to refute—that Congress did not, in 1942, intend to apply the tax to payments in Canada. The argument tacitly admits that Congress did not, then, intend to make the tax applicable to payments outside the United States, when it attempts to explain that, since Canada had a similar tax, it was not necessary to make the tax apply to payments outside the United States, and the later necessity of such a provision did not occur to Congress. That this necessity was *later* perceived because of a change in circumstances, the repeal of the Canadian tax, does not support the proposition that the statute should be so "construed" as of the time of enactment as to provide in advance for the consequences of this change. *Addison v. Holly Hill Fruit Products, supra,* 322 U.S. 607, 617-18, 88 L.ed. 1488, 64 S.Ct. 1215 (1944), and see discussion under heading "The Supplying of Omissions Transcends the Judicial Function," *infra,* page 24.

Another flaw in this argument is that it assumes that Congress could only have been concerned with the exclusion of payments in Canada when it used the language "amount paid within the United States." Actually, this phrase excludes payments throughout the world, and there is nothing to indicate that Congress considered the situation in Canada to be of unique importance.

But the most glaring flaw in the argument is that it

is based upon mistaken facts. Contrary to the assumption of the Court of Claims, that Canada had a similar tax, the fact is that, while Canada had a tax on transportation of *persons* which was repealed in 1949 *it had no tax on transportation of property during the war or after.*[15] Consequently, the chief explanation of the Court of Claims of the assumed intent of Congress falls to the ground by reason of a mistaken premise! There would be more justification for the argument that Congress, realizing in 1942 that Canada had no similar tax on the transportation of property, wanted to eliminate the competitive advantage of Canadian railroad companies by allowing tax-free payment in Canada of charges incurred for transportation within the United States. This argument at least would be based on correct factual premises. But the intrinsic merit of the argument is not at issue. We suggest it merely to illustrate that debate as to the motives of Congress is fruitless, unnecessary and confusing when Congress has made its meaning clear in the language which it has employed.

The Supplying of Omissions in a Statute Transcends the Judicial Function

The above-cited decisions declining to search for an

[15] See Chapter 179, Revised Statutes of Canada, 1927, as amended by Section 4, Chapter 54, Statutes of 1932; Section 6, Chapter 27, Statutes of 1940-41; Section 13, Chapter 32, Statutes of 1942; Section 4, Chapter 60, Statutes of 1947, all of which impose or modify a tax on transportation of persons but impose none on transportation of property. See also Chapter 21, Statutes of 1949, repealing tax on transportation of persons and Report by Committee on Finance, U. S. Senate, on Revenue Act of 1950, referring to repeal of Canadian tax on transportation of persons, 1950-2 Cum. Bull., p. 483, 502.

"implied intent" of Congress[16] are grounded upon the realization that, in actuality, the court was being asked to abandon the traditional limits of the judicial function and allow itself to be drawn into the arena of social, economic and political judgments. It is axiomatic that the role of the legislature is to make the laws and that of the courts is to interpret them. In these cases, the court was being asked in effect to make laws by supplying omissions in them. The effect of the decision of the district court in the instant case was to supply an omission by Congress of payments in Canada from the tax. But, the plain language of the statute failed to provide any support for the contention that the omission was not desired by Congress. And assuming arguendo only that there were strong extrinsic reasons for believing that the omission was not deliberate, established rules of judicial self-restraint made its supplying improper. In *Addison v. Holly Hill Fruit Products,* 322 U.S. 607, 617-618, 88 L.ed. 1488, 64 S.Ct. 1215 (1944), the court called attention to the fact that after-regretted omissions from legislation were inherent in the legislative process:

> "Legislation introducing a new system is at best empirical, and not infrequently administration reveals gaps or inadequacies of one sort or another that may call for amendatory legislation. But it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. 'The natural meaning of words cannot be displaced by reference to difficulties in administration.' * * * "

[16] *Gould v. Gould,* 245 U.S. 151, 153, 62 L.ed. 211, 38 S.Ct. 53 (1915); *Smietanka v. First Trust & Savings Bank,* 257 U.S. 602, 607, 66 L.ed. 391, 425. Ct. 223 (1922) p. 13. above.

In *Iselin v. United States,* 270 U.S. 245, 250, 70 L.ed. 566, 46 S.Ct. 248 (1926), a taxpayer sought a refund of tax imposed by the government upon the sum received by her when she leased her box at the Metropolitan Opera House for the season. The Act under which the government assessed the tax imposed a tax on sales of tickets for amounts in excess of the established price. There was no established price for such boxes, and the statute did not, accordingly, expressly cover such a transaction. The government argued that Congress intended to tax all sales of tickets and gave no indication of an intent to exempt any sales. The Supreme Court held that the plaintiff was entitled to recover the tax. Mr. Justice Brandeis said:

> "It may be assumed that Congress did not purpose to exempt from taxation this class of tickets. But the Act contains no provision referring to tickets of the character here involved; and there is no general provision in the Act under which classes of tickets not enumerated are subjected to a tax . . . Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. *To supply omissions transcends the judicial function* * * *." (Emphasis supplied)

Construction of Lower Court Violated Rule Against Constructions Rendering Part of a Statute Meaningless

For the reasons outlined above, appellant believes that the court should not have attempted to change by construction the plain words of Sec. 3475, which warranted no such construction.

But assuming arguendo that the court was justified in seeking to construe the statute, we believe that the court's construction was an improper one.

We have heretofore argued that this was a selective excise tax statute and that Congress, having omitted other categories of transportation, failed to evince any sweeping intent to tax any categories not included; that the effect of the court's decision was to read into the words "paid within the United States" the antithetical proposition "paid without the United States."

But the court's construction is further objectionable in that it renders a part of the statute meaningless.

If the tax applied whether the amounts were paid within or without the United States, the words "within the United States" were superfluous. Congress need not have included them—it could simply have referred, as did the 1917 Revenue Act,[17] to "amount paid."

It is an elementary rule, however, that the words of a statute shall be construed in such a way that every word is given effect.

That rule was stated in *Application of Rogers* (9 Cir.) 229 F.(2d) 754, 757 (1956), in which this court cited with approval the leading case of *Market Company v. Hoffman,* 101 U.S. 112, 116, 256 L.ed. 782 (1879). There the Supreme Court held:

> "We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment,

[17] See footnote (13), *supra.*

Sec. 2, it was said that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence or word shall be superfluous, void, or insignificant.' "

The same rule was stated in the following cases:

McDonald v. Thompson, 305 U.S. 263, 266; 83 L.ed. 164, 59 S.Ct. 176, reh. den. 305 U.S. 676, 83 L.ed. 437, 59 S.Ct. 536 (1938);

U. S. v. Menasche, 348 U.S. 528, 538-9, 99 L.ed. 615, 75 S.Ct. 513 (1954).

The lower court's construction disregarded this important rule.

Resort to "Legislative History" Was Improper and Inconclusive

The construction of the district court was further erroneous in its reliance upon and interpretation of "legislative history." As did the Court of Claims in the *Kellogg* case, the district court sought the intent of Congress in the report of the Senate Finance Committee upon the Revenue Act of 1950.

At the outset, it should be reiterated that the rule is well established that when there is no ambiguity in a statute, the statements of Congressional committees about the statute are irrelevant. Thus, in *Helvering v. City Bank Farmers Trust Co.,* 296 U.S. 85, 89, 80 L.ed. 62, 56 S.Ct. 70 (1935), the court held that:

"We are not at liberty to construe language so plain as to need no construction, or to refer to Committee reports when there can be no doubt of the meaning of the words used."

This court has stated the same rule in *Jeu Jo Wan v. Nagle* (9 Cir.) 9 F.(2d) 309, 310 (1925):

> "The terms of the act are free from ambiguity and in such cases the courts are not at liberty to resort to or examine the proceedings in Congress."

But, again assuming arguendo that reference to committee reports was proper, we wish now to examine the "legislative history" which was relied upon by the Government in the trial of the case at bar, and invoked by both the Court of Claims in the *Kellogg* case and the district court in the case at bar.

The "legislative history" mentioned above was not the report of any committee of the 77th Congress which enacted Sec. 3475 in 1942. Rather, it was a report of the Senate Finance Committee of the 81st Congress which, in 1950, enacted Section 607(b) of the Revenue Act of 1950, amending Section 3475 so that it applied to amounts paid without as well as within the United States.[18]

The Senate report was preceded by the Report of the Ways and Means Committee of the House of Representatives, where the Revenue Act of 1950 originated. This report contained no suggestion that Section 3475, as enacted in 1942, was ever intended to be broader in scope than its language indicates. In fact, the reported House Bill reduced the tax on transportation from 3 per cent to 1½ per cent, and the committee stated:

> "The tax on transportation of property is a cost of doing business to practically every producer shipping his products to market. Moreover, it is a particularly discriminatory tax, since larger taxes

[18] See footnote (4), *supra.*

must be paid by those shipping greater distances. Thus, this tax particularly discriminates against producers in the South and Far West."[19]

While the Senate Finance Committee report on which reliance was placed by the Government below states that the press releases of the Commissioner of Internal Revenue are correct interpretations of the law as to payments made outside the United States,[20] it refers to the "existence of considerable dispute as to the correctness of these interpretations of law by the Commissioner." Its conclusions have the character of an expression of an opinion on a judicial question, rather than a statement as to the intent of an earlier session of Congress. Nothing is stated to support these conclusions except a quotation from the Commissioner's press release of July 7, 1950.[21] It is reasonable to conclude that this Committee of the 81st Congress had no real indication of the intent of the 77th Congress. Accordingly, the Senate Finance Committee of the 81st Congress was in a position where, like the Court of Claims, the appellee and the district court, it was speculating about the intent of an earlier Congress upon a question when there was no evidence of such intent except for the language employed by that Congress. There is no doubt that the statements of this committee as to the intent of the *81st Congress* with reference to legislation enacted by it would be entitled to great weight. But under the circumstances of the case at bar,

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[19] House of Representatives Report No. 2319, 81st Congress, 2nd Session, Committee on Ways and Means, 1950-2 Cum. Bull. p. 380, 390.

[20] Senate Report No. 2375, 81st Congress, 2d Session, Com. on Finance, 1950-2 Cum. Bull. p. 483.

[21] *Ibid*, p. 502.

they are no more entitled to decisive weight upon the question before this court than are the rulings of the Commissioner of Internal Revenue which they endorse.

The final committee report upon the Revenue Act of 1950, that of the Conference Committee,[22] contains no support for the proposition that in amending Section 3475 Congress simply declared existing law. Instead, in reference to Section 607(b) the report states that "... *it imposes the tax on amounts paid without the United States* for the transportation of property from one point in the United States to another"[23] (emphasis supplied).

An examination of *contemporary* committee reports, those of the 77th Congress, which are far more significant as indications of Congressional intent than those of a later Congress, discloses that they are devoid of any indication that the scope of Section 3475 was intended to radiate beyond its language.

Thus, the Committee on Ways and Means of the House of Representatives, reporting on the Revenue Bill of 1942, which provided for a tax on transportation of property in the amount of 5%, simply stated that:

> "This bill imposes a new tax ... upon the amount paid within the United States for the transportation of property ... from one point in the United States to another ..."[24]

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[22] House of Representatives Report No. 3124, 81st Congress, 2d Session, 1950-2 Cum. Bull., p. 580.

[23] *Ibid*, p. 593.

[24] House of Representatives Report No. 2333, 77th Congress, 1st Session, 1942-2 Cum. Bull., p. 372, 406.

There is no elaboration upon the scope of the tax either in the report of the Senate Finance Committee, which had eliminated the tax on transportation of property altogether on the ground that it contributed to inflation,[25] or in the report of the Conference Committee, which reinstated the tax at 3%.[26]

Indeed, a close examination of the contemporary legislative history of Section 3475, to the contrary of affording support for the construction made by the lower court, would lend support to the contention that the omission from the tax of payments outside the United States was considered and deliberate rather than inadvertent. For the above-mentioned report of the Ways and Means Committee of the House[27] takes cognizance of the fact that: "During the World War a tax was imposed upon transportation of property by freight at a rate of 3% and upon transportation of property by express at a rate of 5%." That this statute was before the House when the Revenue Act of 1942 was drafted is not only clear from the above reference to it, but from an examination of the statute itself. Thus, the Revenue Act of 1917[28] provides as follows:

> "Sec. 500. That from and after the first day of November, nineteen hundred and seventeen, there shall be levied, assessed, collected, and paid (a) a tax equivalent to three per centum *of the amount paid* for the transportation by rail or water or by

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[25] Senate Report No. 1631, 77th Congress, 2d Session ,1942-2 Cum. Bull., p. 504, 553.

[26] House of Representatives Report No. 2586, 77th Congress, 2d Session, 1942-2 Cum. Bull., p. 701, 732.

[27] See footnote (24), *supra.*

[28] Act of October 3, 1917, C. 63, Title V, Sec. 500, 40 Stat. 314.

> any form of mechanical motor power when in competition with carriers by rail or water of property by freight consigned from one point in the United States to another; * * * "(Emphasis added)

If this provision is compared with Section 3475 it will be seen that they are fundamentally similar. Both statutes impose the tax on "the amount paid." But, whereas the earlier provision imposes the tax upon "the amount paid" without qualification as to place of payment, Section 3475 inserts after "the amount paid" the qualification "within the United States." Is it not reasonable to assume that this qualification in the later statute was deliberate and not accidental? Certainly there would seem a sounder basis for that assumption than that in using the words "within the United States" Congress intended the tax to apply regardless of place of payment.

Thus, we reiterate not only that examination of the legislative history of IRC Section 3475 is unnecessary and improper, in the light of the clarity of that provision, but that contemporary committee reports tend to militate against the appellee's contention that IRC Section 3475 should be extended by construction, and tend to support the position of appellant that the statute, neither in fact nor intent, expressly or impliedly, extends to amounts paid without the United States.

II.

The Amounts Paid by Pacific for Transportation Were Not Amounts "Paid Within the United States"

As indicated above, Pacific made the payments in

question with checks delivered by representatives in Canada to the authorized agents of American railroad companies there. These checks were received in payment by the agents and the freight bills were marked "paid" and returned to Pacific's representatives.

No serious contention was made below that this mode of payment did not constitute payment in Canada, and the court correctly found that payment was made by Pacific in a "non-tax place" (R.50).

Our discussion of this point is, however, prompted by a suggestion in the majority opinion in the case of *Kellogg Company v. U.S.*, 132 Ct. Cl. 507, 133 F.Supp. 387 (1955) that where payment was made by check drawn on a United States bank, there was "serious doubt as to whether payment was actually made in Canada." This view was based upon a "technical construction" which focused attention upon the final payment of the check *by the drawee* bank as a significant act rather than its delivery and acceptance as payment. While the majority opinion was grounded upon the theory that the "implied intent" of Congress was to subject all transportation within the United States to the tax regardless of place of payment, the narrow majority of three to two was secured by the concurrence of one judge "on the ground that payment was made within the United States." The two dissenting judges held "that the physical delivery of the cashiers' checks was clearly payment without the United States within the meaning of Section 3475(a) of the Internal Revenue Code."

We believe that the view that payment by check de-

livered outside the United States is payment "within the United States" is untenable. It does violence not only to common and commercial usage, but to established rules of statutory construction.

The argument that "paid" should be construed as limited to the final payment by the drawee bank is untenable for the following reasons:

(1) ***It ignores the common and ordinary meaning of "paid," which includes the giving and receipt of a check***

To pay, in ordinary and common usage, includes to give a check in payment of a purchase or obligation. So common is the use of checks for the payment of obligations today, that the whole business community, indeed the whole population of this country, would be shocked by the notion that the giving and receipt of a check did not constitute payment.

The universality of this usage is indicated by the definition of "pay" in Webster's New International Dictionary, 2d Ed. Unabridged, as including:

> "To give a recompense; to make payment, requital or satisfaction; to discharge a debt; as he *pays* in full, by *check* or on time." (Last emphasis supplied)

The common meaning of payment as embracing the giving and receipt of a check is indicated by the U.S. Court of Appeals for the 8th Circuit in construing the word "paid" as used in IRC Section 24(c):

> "Furthermore, as a matter of common parlance, we think it is most common to speak of 'paying' an

> obligation by giving one's check for it. This is the common method of paying bills in this country."
>
> *Miller v. Commissioner* (8 Cir.) 164 F.(2d) 268, 269 (1947).

The rule is well established that, in the construction of revenue acts, as well as in the construction of other legislation, the natural, ordinary and familiar meanings of words are to be used, in the absence of a specific intent that some special meaning be applied.

In *Helvering v. Flaccus Leather Co.,* 313 U.S. 247, 249, 85 L.ed. 1310, 61 S.Ct. 874 (1941), the Government contended that a sum received in settlement of a fire loss from an insurance company should be regarded as derived from a "sale or exchange of property" within the meaning of Section 117(d) of the Revenue Act of 1924. The court, in holding against the Government, said:

> "Generally speaking, the language of the Revenue Act, just as in any statute, is to be given its ordinary meaning, . . ."

The taxpayer is entitled to have the language of a statute construed in its ordinary and obvious sense, and has been protected by the courts against a devious and strained construction promulgated for the sole purpose of subjecting him to a tax which otherwise does not apply to him. Thus, in *Lynch v. Alworth-Stephens Company,* 267 U.S. 364, 370, 69 L.ed. 660, 45 S.Ct. 274 (1925), the court held that the "plain, rational and obvious meaning" is to be sought by courts, and that it is "always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case

and the ingenuity and study of an acute and powerful intellect would discover."

These principles were applied in the case of *Old Colony R. Co. v. Commissioner,* 284 U.S. 552, 559-61, 76 L.ed. 484, 52 S.Ct. 211 (1932), which we believe is illuminating. There, the court had before it a question of construction of the Revenue Act of 1921. The provision in question specified that, in the computation of net income of a corporation "all interest paid or accrued within the taxable year on its indebtedness" was deductible from gross income. The taxpayer had deducted all interest paid on outstanding bonds. The Government contended that where the bonds were sold at a premium, the premium received by the company had the effect of reducing the real interest paid on the bonds, and that deductible interest should accordingly, be reduced by an amortized portion of the premium. It contended that otherwise the corporation could establish a high rate of interest on the bonds, sell them at a higher premium and thereby secure the full benefit of the interest reduction and avoid taxation on the premium. The Supreme Court held against the Government. Speaking for a unanimous court, Mr. Justice Roberts said:

> "In other words the contention is that by the use of the quoted phrase the statute did not intend to allow the deduction of the amount agreed to be paid, which the contract denominated 'interest,' but of a different sum to be ascertained by a calculation which will allocate the payment between a partial and ratable return of the premium and 'effective' interest on the part of the security.

"Is this the reasonable construction of the language of the act,—'all interest . . . on its indebtedness'? The rule which should be applied is established by many decisions. 'The legislature must be presumed to use words in their known and ordinary signification.' *Levy's Lessee v. McCartee,* 6 Pet. 102, 110. 'The popular or received import of words furnishes the general rule for the interpretation of public laws.' * * * As was said in *Lynch v. Alworth-Stephens Co.,* 267 U.S. 364, 370, 'the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.' This rule is applied to taxing acts: *DeGanay v. Lederer,* 250 U.S. 376, 381.

"Applying the accepted tests to the language of the statute, we are of the opinion that the construction contended for by the Commissioner is inadmissible. In common parlance the bonded indebtedness of a corporation imports the total face of its outstanding bonds,—the amount which must be paid at their maturity. The phrase is not generally used to connote par plus an unreturned proportion of premium.

"And as respects 'interest,' the usual import of the term is the amount which one has contracted to pay for the use of borrowed money. He who pays and he who receives payment of the stipulated amount conceives that the whole is interest. In the ordinary affairs of life no one stops for refined analysis of the nature of a premium or considers that the periodic payment universally called 'interest' is in part something wholly distinct—that is, a return of borrowed capital. It has remained

for the theory of accounting to point out this refinement. We cannot believe that Congress used the word having in mind any concept other than the usual, ordinary and everyday meaning of the term, or that it was acquainted with the accountants' phrase 'effective rate' of interest and intended that as the measure of the permitted deduction * * *

"*In short, we think that in the common understanding 'interest' means what is usually called interest by those who pay and those who receive the amount so denominated in bond and coupon, and that the words of the statute permit the deduction of that sum, and no not refer to some esoteric concept derived from subtle and theoretic anlaysis.*

"If there were doubt as to the connotation of the terms, and another meaning might be adopted, the fact of its use in a tax statute would incline the scale to the construction most favorable to the taxpayer.* * * " (Emphasis supplied)

(2) ***It ignores the usage among shippers and railroad companies, sanctioned and confirmed by the Interstate Commerce Commission and the courts, that the delivery and receipt of a check constitute payment of a freight bill***

The giving of checks in Canada was regarded and accepted both by the plaintiff and the railroad companies concerned as payment. Evidence was the fact that the freight bills were marked "paid" upon delivery of the checks. That understanding reflected a usage which was not only common and general among shippers and carriers, but was expressly recognized and

sanctioned by the Interstate Commerce Commission and the courts.

Part 1, Section 3(2) of the Interstate Commerce Act[29] provides:

> "No carrier by railroad and no express company subject to the provisions of this part *shall deliver or relinquish possession at destination of any freight or express shipment transported by it until all tariff rates and charges thereon have been paid,* except under such rules and regulations as the Commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination." (Emphasis supplied)

This statute made it imperative that a clear and precise definition of "paid" be established and understood among shippers and carriers of freight in interstate commerce.

The rulings of the Interstate Commerce Commission make it clear that payment by check constituted payment within the meaning of the statute. Thus, in *Ex Parte No. 73,* 57 ICC Reports 591, 593, 596, 596B (1920) the Commission considered the meaning of "payment" in the above-quoted provision. It quoted from Circular No. 9, dated June 29, 1918, issued by the Director of Public Service and Accounting in the U.S. Railroad Administration:

> "Assume, for example, that freight is delivered to such regular customer on Monday and that the freight bill is mailed or delivered on the same day to the shipper or consignee, being received by him in due course on the morning of the next day.

[29] 49 U.S.C., Sec. 3(2).

If, now, the shipper or consignee remits his check for the amount during Tuesday so that it may be received by the carrier the morning of Wednesday, that is to be treated as a cash transaction. The bill is presented and paid in due course of business and no period of credit in the ordinary acceptance of that term is given." (Emphasis supplied)

It is to be observed that the remittance of a check is treated as a payment in the foregoing quotation.

The Commission continued:

"The rules and regulations which we promulgate should contemplate the collection of transportation charges prior to, or contemporaneous with, the delivery of most shipments, and, while adhering to the principle of prompt payment of charges should, upon certain freight traffic, give opportunity for the preparation of freight bills at destination, weights to be ascertained after the the carriers have relinquished possession of freight, and for the presentation of freight bills to the appropriate offices and employees of shippers by United States mail, by messenger, or by other proper means, and for payment of the charges in the regular course of business by the shippers. An order will be issued in accordance with these conclusions."

The order then provides for a period of "credit" of 96 hours and concludes that:

". . . valid checks, drafts, or money orders which are satisfactory to the carrier in payment of the tariff charges, within the period of credit prescribed above, *may be deemed to be payment of the tariff charges* within the period of ninety-six hours of credit . . ." (Emphasis supplied)

In 1931, the Commission was asked to revise its rules, and in *Ex Parte 73,* 171 ICC Reports 268, 273, 282, it refers to the argument of shippers that if credit were permitted "they can reduce the number of necessary checks now drawn" and "that they should be allowed to accumulate freight bills and pay them by one or two checks once or twice a week."

The Commission reviewed its former order and decided to keep it in effect with certain changes. The order included a provision, very similar to its predecessor quoted above; in which again it was provided that:

> ". . . valid checks, drafts, or money orders, which are satisfactory to the carrier, in payment of freight charges within the credit periods allowed such shipper may be deemed to be the collection of the tariff charges within the credit period for the purposes of the rules . . ."

In the foregoing rules, and the preambles to them, the Commission recognizes and endorses officially the accepted usage among shippers and carriers that remittance by check is payment of freight charges.

The Supreme Court of the United States has recognized the practice and confirmed its validity under the Interstate Commerce Act. In *Fullerton Lumber Co. v. Chicago, Milwaukee, St. Paul & Pacific R. Co.,* 282 U.S. 520, 521-2, 75 L.ed. 502, 51 S.Ct. 227 (1931), the court held that the requirement for payment in cash permitted payment by check. Mr. Justice Brandeis said:

> "It has long been settled that payment of a carrier's charges must be made in money, and that

the payment must be in cash as distinguished from credit. The purpose of the requirement is solely to prevent rebates or unjust discrimination and to insure observance of the tariff rates. [Citing authorities] The Interstate Commerce Act does not in terms prescribe that the charges shall be paid in money; that is, in coin or currency. *There is no reason for denying to the parties the convenience and safety of making payment, in accordance with the prevailing usage of the business, by means of a check payable on demand drawn on a going bank in which the drawer has an ample deposit.*" (Emphasis supplied)

(3) *"Paid" and "payment" have been construed as meaning the giving and receipt of a check under other sections of the Internal Revenue Code*

A final argument against any contention that "paid" should be construed as excluding the delivery and receipt of a check, arises from the construction of other parts of the Internal Revenue Code.

Delivery and receipt of a check—as contrasted with negotiation or payment—have been held to be payment within the revenue laws in the following contexts:

(a) As income of the recipient as of the date of receipt of the check.

Kahler v. Commissioner, 18 T.C. 31 (1952);

Butler v. Commissioner, 19 BTA 718 (1930).

(b) As a payment of a charitable contribution within the relevant provision governing deductions.

Estate of Spiegel v. Commissioner, 12 T.C. 524 (1949).

(c) As a payment of real estate taxes giving rise to

a deduction for "taxes paid . . . within the taxable year."

Estate of Bradley v. Commissioner, 19 BTA 49 (1930).

In *Estate of Spiegel v. Commissioner,* 12 T.C. 524, 529 (1949), *supra,* the tax court gave exhaustive consideration to the question whether a "payment" within the meaning of Section 23(o) of the Internal Revenue Code of 1939, as amended, took place in the year in which a check was given and received by a charitable institution or in the year in which the check was negotiated and paid. In holding that the "payment" meant the giving and receipt of the check, the court said:

> "It would seem to us unfortunate for the Tax Court to fail to recognize what has so frequently been suggested, that as a practical matter, in everyday personal and commercial usage, the transfer of funds by check is an accepted procedure. The parties almost without exception think and deal in terms of payment except in the unusual circumstances, not involved here, that the check is dishonored upon presentation, or that it was delivered in the first place subject to some condition or infirmity which intervenes between delivery and present action . . .
>
> "With knowledge of the prevalence of this practice, and of the necessity of treating tax questions from a practical rather than a theoretical viewpoint, it would be astonishing indeed if by the use of the word 'payment,' in section 23(o), Congress did not intend to include a check given absolutely and in due course subsequently presented and paid . . ."

CONCLUSION

Under the cases and principles cited above, the lower court erred in extending the plainly and unambiguously stated scope of the excise tax statute under consideration by construction. Without any contention that there was ambiguity in the statute, the court sanctioned the sudden arbitrary reversal by the Commissioner of Internal Revenue of seven and one-half years of recognition of the plain meaning of the statute. It endorsed the incredible legerdemain through which the phrase "within the United States" was made to embrace its antithesis, "without the United States," without benefit of statutory amendment, and thus render itself entirely meaningless. This extreme and unprecedented result was reached solely on the basis of an assumed intent of Congress, the quest for which was, as we have pointed out above, not only unsanctioned by authority but infelicitous factually. What is, in effect, an amendment of a statute in this manner, transcended the historic function of the judiciary to interpret and not make the laws, and the traditional rules of judicial self-restraint which are rooted in the constitutional doctrine of separation of powers. We submit that the judgment of the district court should be reversed with directions that the court enter a judgment in favor of appellant and against appellee in the sum of $78,937.17, together with interest thereon as provided by law.

Respectfully submitted,

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APPENDIX A

I. R. C. Section 3475 as Added to the Internal Revenue Code of 1939 by Section 620(a) of the Revenue Act of 1942

"SUBCHAPTER E—TRANSPORTATION OF PROPERTY

"Section 3475. *Transportation of property*

"*(a) Tax.* There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation.

"*(b) Exemption of government transportation.* . . .

"*(c) Returns and payment.* The tax imposed by this section shall be paid by the person making the payment subject to the tax. Each person receiving any payment specified in subsection (a) shall collect the amount of

the tax imposed from the person making such payment, and shall, on or before the last day of each month, make a return, under oath, for the preceding month, and pay the taxes so collected to the collector in the district in which his principal place of business is located, or if he has no principal place of business in the United States, to the Collector at Baltimore, Maryland. Such returns shall contain such information and be made in such manner as the Commissioner with the approval of the Secretary may by regulations prescribe.

"*(d) Extensions of time* . . .

"*(e) Registration* . . ."

APPENDIX B

TABLE OF EXHIBITS

The following exhibits were identified, offered and admitted in evidence without objection at the trial of this case on September 6, 1957:

Exhibit	*Description*	*Record*
No. 1	Recapitulation of transportation taxes paid.	R. 43
No. 2	Check No. 37601 dated September 25, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce, Seattle, Wash., payable to the order of Chicago and North Western Railway Company in the sum of $452.55, together with two freight bills paid by said check.	R. 43-44
No. 3	Check No. 36610 dated September 8, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce, Seattle, Wash., payable to the order of Chicago, Burlington & Quincy Railroad Company in the sum of $664.11, together with the freight bills paid by said check.	R. 44
No. 4	Check No. 24676 dated July 13, 1950, drawn by Pacific Fruit & Produce Company on the Seattle-First National Bank of Seattle, Wash., to the order of Chicago, Milwaukee, St. Paul & Pacific Railroad Company, in the sum of $532.85, together with freight bill paid by the said check.	R. 44
No. 5	Check No. 38698 dated October 9, 1950, drawn by Pacific Fruit & Prod-	R. 44

Exhibit	*Description*	*Record*
	uce Company on the National Bank of Commerce, Seattle, Wash., to the order of the Colorado and Southern Railway Company, in the sum of $35.02, together with freight bill paid by the said check.	
No. 6	Check No. 38983 dated October 12, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce of Seattle, Wash., to the order of Great Northern Railway Company, in the sum of $632.52, together with freight bill paid by the said check.	R. 44
No. 7	Check No. 38988 dated October 12, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce of Seattle, Wash., payable to the order of Northern Pacific Railway Company in the sum of $202.59, together with two freight bills paid by said check.	R. 45
No. 8	Check No. 38987 dated October 12, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce of Seattle, Wash., payable to the order of Southern Pacific Company, in the sum of $13.36, together with two freight bills paid by said check.	R. 45
No. 9	Check No. 37621 dated September 25, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce of Seattle,	R. 45

Exhibit	*Description*	*Record*
	Wash., payable to the order of Spokane, Portland and Seattle Railway Company, in the sum of $380.45, together with three freight bills paid by said check.	
No. 10	Check No. 38984 dated October 12, 1950, drawn by Pacific Fruit & Produce Company on the National Bank of Commerce of Seattle, Wash., payable to the order of Union Pacific Railroad Company in the sum of $8.20, together with freight bill paid by said check.	R. 45
No. 11	Office copy of Check No. 15712 dated July 24, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minnesota, payable to the order of Illinois Central Railroad Company, in the sum of $373.04, together with office copies of three freight bills paid by said check.	R. 46
No. 12	Office copy of Chec No. 06365 dated October 17, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minnesota, payable to the order of Chicago, St. Paul, Minneapolis & Omaha Railway Co., in the sum of $374.07, together with office copy of freight bill paid by said check.	R. 46
No. 13	Office copy of Check No. 15708 dated July 24, 1950, drawn by Gamble-Robinson Company on the North-	R. 46

Exhibit	*Description*	*Record*
	western National Bank, Minneapolis, Minn., payable to the order of Chicago Great Western Railway Company, in the sum of $173.42, together with office copy of freight bill paid by said check.	
No. 14	Office copy of Check No. 01124 dated August 10, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minn., payable to the order of Chicago, Rock Island & Pacific Railroad Co., in the sum of $786.93, together with office copy of freight bill paid by said check.	R. 46
No. 15	Office copy of Check No. 15388 dated July 13, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minn., payable to the order of Minneapolis, St. Paul & Sault Ste. Marie Railroad Co., in the sum of $623.90, together with office copy of freight bill paid by said check.	R. 47
No. 16	Office copy of Check No. 15373 dated July 12, 1950, drawn by Gamble-Robinson Company on the Northwestern National Bank, Minneapolis, Minn., payable to the order of Minneapolis & St. Louis Railway Co., in the sum of $627.99, together with office copy of freight bill paid by said check.	R. 47

Exhibit	*Description*	*Record*
No. 17	Miscellaneous Tax Rulings of Commissioner of Internal Revenue, 1943: M.T. 15 (1943 Cum. Bull. p. 1158-9); M.T. 9 (1943 Cum. Bull. p. 1159-60); M.T. 13 (1943) Cum. Bull, p. 1161); M.T. 18 (1943 Cum. Bull. p. 1162).	R. 70
No. 18	Miscellaneous Tax Ruling of Commissioner of Internal Revenue, 1948: M.T. 26 (1948-1 Cum. Bull. p. 141).	R. 70
No. 19	Miscellaneous Tax Ruling of Commissioner of Internal Revenue, 1949: M.T. 35 (1949-1 Cum. Bull., p. 250).	R. 70
A-1	Mimeograph letter (Mim. 5447, 1942-2 Cum. Bull. p. 280) dated December 7, 1942.	R. 47
A-2	Treasury Department Press Release S-2100, dated Friday, September 2, 1949.	R. 47
A-3	Letter ruling of Acting Commissioner of Internal Revenue, dated April 11, 1950.	R. 47
A-4	Letter ruling of Deputy Commissioner of Internal Revenue, dated June 28, 1950.	R. 47
A-5	Treasury Department Press Release S-2389, dated Friday, July 7, 1950.	R. 47